LEE SOH HUA

v.

KOW LUP PIOW & ORS.

FEDERAL COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
HASHIM YEOP SANI FJ
SYED AGIL BARAKBAH FJ
[CIVIL APPEAL NO. 18 OF 1982]
13 MARCH 1984

CONTRACT: *Written agreement for sale and purchase of land - Claim for specific performance and damages - Approval of subdivision of land subject to conditions - Whether buyer knew of and agreed to comply with conditions before execution of agreement - Evidence - Whether admissible.*

CIVIL PROCEDURE: *Appeal - Finding of trial Judge - Whether appellate Court justified in interfering with it.*

The appellant was the registered owner of certain lands in Seremban. Approval was given for subdivision of the land subject to compliance with certain conditions. The appellant entered into a sale and purchase agreement with the respondents, who were developers. Subdivisional titles were not issued because the conditions were not complied with.

The respondents sued for specific performance of the agreement and for damages. The issue was as to who was responsible for the compliance of the conditions. The appellant sought to adduce oral evidence to prove that the respondents had known of the conditions at the time of the execution of the agreement and had orally agreed to comply with them. She alleged that as there was non-compliance, termination of the contract was lawful. The respondents denied any such knowledge or agreement. The trial Judge gave judgment for the respondents. The appellant appealed.

Held:

[1] On the facts of the case, oral evidence should not be admitted. When a contract has been reduced to the form of a document, s. 91 of the Evidence Act excludes the admission of oral evidence unless otherwise expressly provided in the Act. Similarly, oral evidence is excluded under s. 92 to contradict, vary, add to or subtract from the terms expressed in the document.

[2] The Court should not interfere with the finding of the trial judge. The case was not the sort of case that an appellate Court is justified in reversing the decision of the trial Judge by substituting its own view of the facts for that of the trial Judge.

[Appeal dismissed.]

Cases referred to:

Tindok Besar Estate Sdn. Bhd. v. Tinjar Co. [1979] 2 MLJ 229
Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros. [1980] 2 MLJ 16
Tan Chong & Sons Motor Co. Sdn. Bhd. v. Alan McKnight [1983] 1 MLJ 220; [1983] CLJ (Rep) 394
Tan Siow Gaik v. Loke Poh Seong [1978] 2 MLJ 171
Lebai Taib v. Abdul Ghani & Anor. [1973] 1 MLJ 109

Legislation referred to:
Evidence Act 1950, ss. 91, 92

For the appellant - Raja Aziz Addruse (Wong Weng Kwai with him); M/s. Mah-Kok & Din
For the respondents - James Ponniah (Soo Lim Pang & Ibrahim bin Ismail with him); M/s. Stanley Ponniah Ng & Soo

JUDGMENT

Lee Hun Hoe CJ (Borneo):

This is an appeal against the decision of the learned Judge in granting specific performance and awarding RM50,000 as damages.

The appellant/defendant was the registered owner of certain lands in Seremban and the respondents/plaintiffs were developers. In March 1967 approval was given for subdivision of her lands subject to compliance with certain conditions which involved considerable finance. So, she left the matter in abeyance. Then in 1974 she again applied to the Collector of Inland Revenue, Encik Haron Awol (PW6) for subdivision through her surveyor Tuan Haji Mydin. The layout plans were sent to various departments for comments. In March 1975 the Seremban Town Council met and accepted the recommendation of its engineer, Lim Heng Shea (PW4) that the layout plans be approved subject to the following three conditions:

1) that an approach road of not less than 20 feet should be constructed from Jalan Rasah, Seremban, to the said lands;

2) that a proper layout plan showing the main roads, lanes and main drains should be submitted for approval by the relevant authorities;

3) that the construction of the main roads, lanes and main drains should be in accordance with the approved plans.

By a letter dated 3 May 1975 Mr. Lim informed PW6 that the layout plans were approved subject to the said three conditions. According to PW6 a summary of all comments were sent to the Commissioner of Lands and Mines on 13 June 1975. The latter minuted his approval on the file on 13 September 1975 in these words:

> The subdivision is approved. But the question of alienation of Government State land will be dealt with by a separate exercise.

Nothing was said about the three conditions. On the same day the Commissioner endorsed his approval of the plans with the word "diluluskan". A letter dated 20 September 1975 was sent to the Town Council with two copies of the plan for endorsement. A copy of this letter was sent to the appellant's surveyor. Lim replied on 30 September 1975 that he would not endorse the plans until the three conditions specified in his earlier letter had been fulfilled.

Appellant's husband admitted in evidence that he was given a copy of the minute dated 13 September 1975 by Yacob bin Ibrahim (PW7) the clerk of the Municipality two or three days after the minute was written. It is also the respondents' contention that the appellant and her surveyor also knew of the minute. The appellant and her husband were therefore under the impression that the approval for subdivision was not subject to the three conditions. There was therefore no reason for appellant's husband to discuss about the three conditions with the respondents. So, sometime after 13 September 1975 appellant issued an option to be valid up to 23 September 1975. According to the respondents the "diluluskan" plan was attached to the option. On the other hand, appellant said it was not so but that it was attached

later. It is the respondents' case that because of the "diluluskan" plan they did not inquire further into the matter. The result is that on 22 September 1975 the parties entered into an agreement whereby the respondents agreed to buy and the appellant to sell her lands for RM700,000 of which RM150,000 was paid on the execution of the agreement. The balance to be paid by two instalments. The first sum of RM150,000 was to be made on or before 15 November 1975 and the remaining sum of RM400,000 within one month after the respondents were informed in writing of the issuance of the subdivisional titles by the proper registering authority. The first instalment of RM150,000 was paid on 11 November 1975. The subdivisional titles could not be issued because the Town Council insisted on compliance with the three conditions. The respondents denied they knew anything about the three conditions until 31 April 1976 when they were officially informed by the appellant of them. On the other hand, the appellant maintained that the respondents knew of the three conditions before executing the agreement. She said that they agreed orally to comply with the three conditions. Hence, she entered into the agreement. For this reason she sought for admission of such evidence under s. 92 of the Evidence Act. The learned Judge ruled against the admissibility of such evidence under s. 92 on the ground that it was an attempt to vary the agreement.

Eight days after the agreement, that is, on 30 September 1975 Lim, as mentioned earlier, informed PW6 that the Council was not going to endorse the plan as the three conditions imposed were not complied with. As this was a departmental correspondence no copy was given to the appellant so she did not know of the situation. She still believed the three conditions were shelved.

Clause 11 of the agreement provides that:

> The vendor shall take all steps and sign all documents necessary for the early issue of subdivisional titles of the said lands according to the layout plan annexed hereto.

The responsibility of the appellant is clear but as the learned Judge found she conveniently forgot it. By a letter dated 7 September 1976 the appellant terminated the agreement on the ground that no drainage plans were submitted to the Council for approval. The appellant takes the view that Clause 11 does not require her to take steps in regard to the three conditions but merely steps to sign documents. The appellant said that there is no possibility of the respondents having seen the "diluluskan" plan. It was submitted that the learned Judge started on the wrong basis when he relied heavily on Clause 11. He took the view that the appellant had not taken any step to do anything. He had not taken into account many matters. The reason for the delay on the part of the respondents was the lack of money. Excuse of the three conditions was merely an afterthought. It is appellant's contention that the termination is lawful. The appellant submitted that the learned Judge did not exercise his discreation judicially in granting specific performance. In support *Tindok Besar Estate Sdn. Bhd. v. Tinjar Co.* [1979] 2 MLJ 229 was cited. On the other hand, the respondents submitted that even if the learned Judge was wrong the alleged breaches did not allow the appellant to forfeit the RM300,000 but at most to damages. However, it was their submission that the learned Judge was justified in his finding of facts on the evidence and documents.

Because of the impasse the respondents decided to call a meeting and engaged a consultant. The consultant thought there was no need to have the signature of the owner on the plan. It seems that he was wrong. Apparently, the practice was for the owner of the land to sign the plan. The point is that the respondents did submit the plan. In his evidence Yacob (PW7) admitted receiving the letter with the plan as he initialed and wrote the date 9 July 1976. He found the land owner's signature was not on the plan. So, he kept the plan aside to get the owner to sign as he knew appellant's husband as the land was owned by the appellant.

Anyway, he sat on the matter until the first respondent went to enquire about the matter. It was then that he put the plan into the file where the letter was kept and stamped the date 4 October 1976 and passed it to Lim. There is little doubt that PW7 was helping the appellant. He was working hand in hand with the appellant's husband. It cannot be disputed that the Council received the letter with the plan on 9 July 1976 which was two months before the termination of the agreement by the appellant. At the time the appellant's husband and the appellant did not know that it was necessary for the owner of the land to sign the plan. This could be seen from the correspondence, particularly the second paragraph of the letter 24 August 1976 from appellant's solicitors which states that:

> ... Till date no plans as aforesaid have been sent to our client for signature resulting in inordinate delay in the issue of the qualified titles. Since time is of the essence your clients are in serious breach of the said Agreement.

Certain facts were disputed. First, with regard to the plan the respondents say they saw the plan with the "diluluskan" so they did not enquire further into the matter. On the other hand, the appellant says that the plan was not attached to the option but was later attached and it was not one with the "diluluskan". Appellant says the best witness would be the respondents' solicitor. He could explain why the "diluluskan" plan was not attached to the agreement. No blame can be attached to the solicitor. He is bound by the agreement and his lips are sealed. Secondly, appellant's husband maintained that Clause 9 of the agreement covers the said three conditions. It reads:

> ... all expenses incurred for the development and improvement of the said lands, for the purchase of any adjoining state land, construction of roads, lanes, drains, culvert, etc. and the issue of titles to the subdivisional lots of the said lands and the costs of survey with effect from the date hereof shall be borne and paid by the Purchasers, but the Purchasers shall pay to the Vendor on the date of completion of this sale all deposits paid by her to the Private Surveyor, Haji Maidin Bin Abdul Manap hencetofore in respect of the subdivision of the said lands according to the layout plan hereto annexed.

Appellant contended that Clause 9 shows that the respondents knew of the said three conditions as it is the implementation provision of the said three conditions. It was submitted that Clause 9 provides the liabilities for the respondents to carry the said three conditions. There is therefore no variation of Clause 9 by the introduction of the three conditions. Clause 9 is not new but merely a carry over from the option. Appellant cited *Tan Swee Hoe Co. Ltd. v. Ali Hussain Bros.* [1980] 2 MLJ 16 and also referred to in *Law of Evidence* by Woodroffe and Ameer Ali 13th Edn., Vol. 2 (1975), p. 1925. It is the submission of the appellant that the respondents knew of the three conditions and their liability for all the expenses for the works. The respondents maintained they did not know of the said three conditions at the time of the agreement. They knew of the said three conditions on receipt of a letter dated 21 April 1976. The issue is whether the respondents knew of the three conditions at the time of executing the agreement. As to Clause 9 the learned Judge considered that nothing in that clause related to the three conditions. He observed that:

> ... These three conditions were not minor ones. They involved a great deal of work and expenditure and it is utterly difficult to comprehend that such important matters would simply be left out of a formal agreement of purchase and sale involving a large and expensive piece of land.

Thirdly, the admissibility of the oral evidence has been dealt with by the learned Judge. In support the appellant cited *Tan Chong & Sons Motor Co. Sdn. Bhd. v. Alan McKnight* [1983] 1 MLJ 220 @ 229 and *Tan Siow Gaik v. Loke Poh Seong* [1978] 2 MLJ 171 @ 172 which followed *Lebai Taib v. Abdul Ghani & Anor.* [1973] 1 MLJ 109. Each case must be decided according to its own particular facts. The learned Judge has given careful consideration to the matter and ruled against its admissibility under s. 92 of the Evidence Act. He summed up his impression of the appellant in these words:

> ... The defendant appeared to have taken the three conditions lightly and as Mr. James Ponniah submitted she might well have formed the impression that the conditions would no longer be applicable. It seems to me very likely that the defendant deliberately kept back this information from the plaintiffs so as not to jeopardise her plan to sell the land at the price of RM700,000 to the plaintiffs and leaving the plaintiffs later on to face the problem themselves. Now the defendant was trying to bring in oral evidence in an attempt to vary the terms of the written agreement which in my view is fairly complete and exhaustive in its terms. In the circumstances therefore I was of the view that under ss. 91 and 92 of the Evidence Act such oral evidence was inadmissible.

We agree with the learned Judge for the reasons he gave that such evidence could not be admitted on the facts of this particular case. It is difficult to imagine not specifically mentioning such important matter as the fulfilment of the said three conditions in the agreement. In considering the totality of the evidence including the documents it does indicate that the respondents did not know of the said three conditions. In fact, it shows that appellant knew of the three conditions as early as 1967 but in 1975 she thought the said three conditions were not necessary to be complied with in the light of the minute of the Commissioner for Lands and Mines and the letter dated 20 September 1975 to the Council. The respondents made clear that they would not have offered to pay such price if they knew of the said three conditions. When a contract has been reduced to the form of a document s. 91 of the Evidence Act excludes oral evidence of the terms of the document by requiring those terms to be proved by the document itself unless expressly provided in the Act. Also, s. 92 of the said Act excludes oral evidence for the purpose of contradicting, varying, adding to or subtracting from such terms.

Having gone through a fairly lengthy trial the learned Judge arrived at the conclusion that both the options and the agreement contained categorical assertions that the appellant had already obtained approval for the subdivision of her land. He held the assertions to be patently false because the authorities had already notified the appellant through her surveyor that she had to comply with the three conditions before approval could be given for subdivision. He accepted the evidence of the respondents that they only knew of the three conditions on 21 April 1976, some seven months after the signing of the agreement. At any rate the respondents by letter dated 26 April 1976 told the appellant that the responsibility for satisfying the three conditions rested with her under Clause 11 of the agreement. The learned Judge made clear that he accepted the evidence of the respondents that had they known about these three conditions they would not have offered RM700,000 because they would have to expend a large sum of money to comply with the three conditions.

The learned Judge was faced with two different stories - the appellant's version and the respondents' version. He had to decide which was the truthful one. Very much depends upon the credibility of the witnesses in view of the conflicting evidence. We did not have the same opportunity as the learned Judge in seeing and hearing the witnesses and assessing

their credibility. He accepted the story of the respondents as true. He has approached the matter cautiously and we cannot say he has not directed himself correctly. This is not a sort of case that an appellate Court is justified in reversing the decision of the trial Judge by substituting its own view of the facts for that of the trial Judge. We do not think we should interfere with his finding. We would therefore dismiss the appeal with costs. Deposit to the respondents on account of taxed costs.

Also found at [1984] 2 CLJ 85